

BEFORE THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

DT 07-011

**VERIZON NEW ENGLAND, INC., BELL ATLANTIC COMMUNICATIONS, INC.,
NYNEX LONG DISTANCE CO., VERIZON SELECT SERVICES, INC.,
AND FAIRPOINT COMMUNICATIONS, INC.**

Transfer of Assets to FairPoint Communications, Inc.

**OFFICE OF CONSUMER ADVOCATE'S MOTION FOR IMMEDIATE
CLARIFICATION OF ORDER NO. 24,823**

The Office of Consumer Advocate (OCA) respectfully requests that the New Hampshire Public Utilities Commission (Commission) immediately clarify Order No. 24,823, as it concerns the Commission's review and the OCA's request for copies of documents filed by FairPoint pursuant to sections 2.7 and 2.8 of the petitioners' settlement agreement with the Staff of the Commission (Staff) (NH Settlement), which was approved by Order No. 24,823. In the alternative, the OCA requests that the Commission temporarily suspend Order No. 24,823. In support, the OCA states the following facts and law.

1. On February 25, 2008, the Commission issued Order No. 24,823 (Order).
2. The Order approves the "petition of Verizon New England, Inc., Bell Atlantic Communications, Inc., NYNEX Long Distance Company, Verizon Select Services, Inc. and FairPoint Communications, Inc. [(FairPoint)], for authority pursuant to sections 26 and 30 of RSA 374 to transfer to FairPoint Communications, Inc. the New Hampshire utility franchise presently held by Verizon New England and affiliates, subject to the terms of the petitioners' settlement agreement with the Staff of the New Hampshire Public Utilities Commission and as further conditioned in the order." Order at 89.
3. The NH Settlement agreement requires FairPoint to file numerous documents but does not state explicitly or consistently in many instances how the documents are to be filed (*e.g.*,

directly with Staff or with the Commission through its Executive Director with copies to parties on the service list) or to whom copies of the documents will be provided (*e.g.*, the parties in this proceeding, only Staff or the Staff and the Commission).

4. In pertinent part, the NH Settlement, as approved by the Order, requires FairPoint to file not later than ten calendar days before the Closing Date the final copy of its Credit Agreement. *See* NH Settlement Agreement at 13, section 2.7. *See also* Order at 24. The NH Settlement Agreement, as approved by the Order, also requires FairPoint to file not later than two business days after the issuance of any order of the Commission approving the Merger a copy of its near-final Description of Notes. *See* NH Settlement Agreement at 13, section 2.8. *See also* Order at 24.

5. On February 8, 2008, in response to a request of the Commission, Staff and FairPoint filed a memorandum and spreadsheet (Memorandum and Spreadsheet), which purported to “clarify the filing requirements included in various sections of the settlement agreement[.]” *See* Memorandum from Kate Bailey and Lynn Fabrizio to Chairman Getz, Commissioner Morrison, Commissioner Below, Executive Director Howland, and General Counsel Kreis, dated February 8, 2008, at 1. *See also* Order at 24, footnote 8.

6. With regard to the filings of the Credit Agreement and Description of Notes, the Memorandum and Spreadsheet characterize for the first time the process associated with these filings as “*in camera* with the Commission.” *See* Memorandum, p. 2, and Spreadsheet, “Compliance Filings” tab.¹ The Order appears to adopt this characterization. *See* Order at 24.

¹ Following the receipt of Staff’s Memorandum and Spreadsheet, the OCA considered filing a formal response with the Commission, to address among other issues the issue discussed herein about the “*in camera*” characterization of the Commission’s review of the Credit Agreement and Description of Notes. Rather than take this step, the OCA attempted to negotiate a resolution with Staff and FairPoint. It had been the OCA’s expectation throughout these negotiations that a revised Memorandum and Spreadsheet would be filed before the Commission issued its Order on the petition. These revised documents, however, were just filed today, after the Order was issued.

7. In its closing statement to the Commission at the conclusion of hearings on the NH Settlement, the OCA specifically requested that FairPoint be required to provide the OCA a copy of the final Credit Agreement and near-final Description of Notes. *See* Transcript, February 5, 2008, p. 187, lines 14-23. This request, however, is not mentioned in the Order. Rather, the Commission merely states that the OCA “described aspects of the settlement agreement that create additional reporting requirements and review processes that require further clarification.” Order at 52.

8. Further, the Order does not define “*in camera*” in terms of whether or not such review includes or excludes the OCA.

9. In effect, sections 2.7 and 2.8 of the NH Settlement, as approved by the Order, extend the Commission’s review of the merits of the proceeding, specifically on certain financial issues, after the issuance of the Order. The process contemplated by these sections of the NH Settlement includes a determination of “whether any new or amended provisions of the Credit Agreement ... materially and adversely affect the financial condition of FairPoint” and “whether further process is necessary, including (but not limited to) the possibility of reconsideration of [the Commission’s] order approving the Merger.”

10. This further process will take place before an order in this proceeding becomes final. *See, e.g.*, RSA 541:3 and RSA 541:6 (authorizing rehearing and appeal to the NH Supreme Court, respectively). As such, this further process allowed by the NH Settlement will occur within the context of these adjudicative proceedings and must be conducted in a manner consistent with the requirements for adjudicative proceedings. *See, e.g.*, RSA 541-A:31, IV (requiring Commission to provide parties with the opportunity to respond and present evidence and argument on all issues involved). However, in approving without revision sections 2.7 and

2.8 of the NH Settlement and in not responding to the OCA's request for the documents referenced in these sections, the Order appears to imply that this further process is closed to all but Staff and the Commission. *See* NH Settlement, pp. 13-14, sections 2.7 and 2.8.

11. If it is the intent of the Commission to deny the OCA's request for copies of these documents and to preclude, in effect, the OCA's right to participate in these proceedings, the OCA respectfully requests that the Commission make this ruling explicit, including the legal authority upon which such a ruling rests.

12. The Commission may clarify the Order as requested by the OCA. *See* RSA 365:28 ("At any time after the making and entry thereof, the commission may, after notice and hearing, alter, amend, suspend, annul, set aside, or otherwise modify any order made by it.").

13. An immediate ruling on the OCA's motion for clarification is necessary because the process contemplated by section 2.8 of the NH Settlement Agreement, as approved by the Order, has already begun. The Description of Notes was filed with the Commission yesterday. *See* NH Settlement at 13, section 2.8. FairPoint did not provide a copy of this filing to any party other than the Staff. Pursuant to the terms of the NH Settlement, as approved by the Order, the Commission must act on the Description of Notes no later than Monday, March 3. *See* NH Settlement, p. 14, section 2.8.

14. In this case the Commission has already approved an unprecedented four separate levels of confidential information. *See* Order No. 24,792, September 27, 2007. To withhold these filings from the OCA would, in effect, create another level of confidentiality without a legal basis. *Id.* *See also, e.g.,* Order at 15, referencing ruling of the Commission denying FairPoint's motion for partial reconsideration "to the extent the motion sought to restrict access to the rural

LEC and CLEC memorandum of understanding solely to Staff and the Commission.”); and Transcript, October 30, at 6-7.

15. If the Commission is not inclined to rule immediately on the OCA’s motion for clarification, a suspension of the Order is required.

16. The Commission’s rules do not prescribe a standard for motions to suspend an order. *See* Puc 200.

17. RSA 541:18, which concerns suspensions of orders by the NH Supreme Court pending appeal, permits suspensions when justice requires.

18. The OCA respectfully suggests that this is the appropriate standard by which to judge its request for suspension of the Order. If the Commission declines to immediately rule on the OCA’s motion for clarification, the OCA respectfully suggests that justice requires an immediate suspension of the Order, including the process contemplated under sections 2.7 and 2.8 of the NH Settlement, pending the Commission’s review and consideration of this motion and any rehearing motion that may follow. If the Commission were not to suspend the Order as requested, the sections 2.7 and 2.8 process would proceed and render any subsequent challenge to that process ineffective at best; there is no way to turn back the clock and undo the process once the time for this process expires.

19. Such a limited suspension of the Order for this purpose will not unfairly prejudice the parties, including FairPoint. The Merger may not close until after the decision of this Commission becomes final. This will not occur until, at the earliest, the period for rehearing has expired or March 26. Even if the Commission suspends the Order until this period for rehearing expires, the delay in the process provided by sections 2.7 and 2.8 of the NH Settlement will be limited to the expedited time periods provided therein, *i.e.*, 12 days at most. *See* NH Settlement,

pp. 13-14, section 2.7, 12 days maximum, and section 2.8, no more than 9 days remain, as three days have passed since the issuance of the Order as of the filing of this motion.

20. Due to the need for an expedited filing, the OCA was not able to seek positions from the parties in the case.

Wherefore, the OCA respectfully requests that the Commission provide the following relief:

- A. Immediately clarify the Order so that it explicitly responds to the OCA's request for copies of the final Credit Agreement and near-final Description of Notes, as referred to in sections 2.7 and 2.8 of the NH Settlement; or
- B. Immediately suspend the Order if the Commission declines to immediately rule on the request for clarification; and
- C. Grant such other relief as justice requires.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was forwarded this day to the parties by electronic mail.

February 28, 2008



Meredith A. Hatfield